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No. 89-1273

In The Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL LOGISTICS GROUP, LTD.,
Petitioner,

v.

CHRYSLER CORPORATION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT CHRYSLER CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Pointedly ignoring the issues actually presented and decided in favor of respondent Chrysler Corporation by the courts below, twenty state Attorneys General, as Amici, have attempted to convince this Court that important antitrust issues are presented here by petitioner International Logistics Group, Ltd. (ILG). In so doing, Amici have distorted the court of appeals' holding and mischaracterized the evidence below. In rejecting ILG's claim, the lower courts merely held that Chrysler's termination of ILG as a Chrysler parts distributor for failing to follow Chrysler's unilateral nonprice distribution policies was reasonable and otherwise consistent with the antitrust laws. The larger issues argued by Amici are simply not implicated, and ILG's petition for certiorari accordingly should be denied.

ARGUMENT

I. THE ARGUMENTS OF AMICI SHOULD BE ACCORDED NO WEIGHT BECAUSE THEY ARE BASED ON AN INACCURATE RENDERING OF THE FACTS

Amici assert that ILG's claim involved a bid rigging or bid allocation agreement between it and Chrysler arising from Chrysler's non-price vertical distribution policies, which required Chrysler export distributors to sell overseas those parts they purchased directly from Chrysler. Amici concede that a bid rigging or bid allocation agreement can only arise "between two competitors" (Br. at 4). *See Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). Amici incorrectly assert, however, that Chrysler and ILG were competitors in the sale of parts to which Chrysler's challenged distribution policies apply.

ILG was a distributor that acquired parts from several sources, including many of the over 2400 companies other than Chrysler which make parts suitable for use in Chrysler vehicles. ILG also obtained Chrysler parts from sources other than Chrysler's export program. As to parts from these non-Chrysler sources, Chrysler's export policies had no impact on ILG's ability to obtain and to sell parts to the government at any price and under any conditions it chose. In that sense, ILG could be considered a Chrysler competitor, but no action by Chrysler involved in this case had any effect whatsoever on ILG's ability to conduct that aspect of its business.

As relevant here, ILG was at most an unauthorized distributor to the United States government of Chrys-

ler parts obtained directly from Chrysler's export program. As to these Chrysler parts, ILG was never a competitor of Chrysler, even under a dual distribution concept, because Chrysler did not permit the resale of its parts to the government. ILG's claim that it was Chrysler's competitor in the resale of Chrysler's own parts derives solely from ILG's violation of Chrysler's rules against sales to the U.S. government of parts purchased from Chrysler.[1] Thus, ILG as a Chrysler export customer was never one of Chrysler's competitors on government bids to supply Chrysler parts. Therefore, even if ILG had agreed to the distribution policies of Chrysler's export program[2], such an agreement could not constitute bid rigging or bid allocation in violation of Section 1 of the Sherman Act. *See United States v. Colgate*, 250 U.S. 300 (1919).

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[1]As noted in Chrysler's Brief in Opposition to Petition for Certiorari, ILG continued to sell parts suitable for use in Chrysler vehicles to the United States government which it obtained from sources other than Chrysler long after it ceased being a customer of Chrysler's export program.

[2]Amici admit that ILG never agreed to refrain from submitting bids to the United States government offering parts purchased directly from Chrysler's export program, and that in fact ILG made such offers. (Br. at 3). Amici attempt instead to rely on evidence that another distributor, UWD, had agreed to withdraw a bid to the government in which it too had offered to provide parts purchased from Chrysler's export program to the government in violation of Chrysler's distribution policies. Amici also mention a third distributor, Jamco, with which Chrysler's Marine and Industrial Division contracted in 1985, two years after Chrysler stopped selling export parts to ILG, to bid on small government contracts, those under $10,000, on which Chrysler would not otherwise have bid. (Br. at 4). The trial judge specifically rejected this evidence because ILG failed "in connecting it up with evidence of similar agreements affecting [ILG's] business." (App. B-1 at 8).

II. THE AMICI'S ARGUMENTS ARE ALSO UNPERSUASIVE BECAUSE THEY MISCHARACTERIZE THE SIXTH CIRCUIT OPINION

In their brief, Amici argue the merits of legal principles extending far beyond the Sixth Circuit's limited decision regarding the termination of ILG in an effort to suggest that review by this Court is warranted.[3] As this Court has consistently held, however, the Court "sit[s] to decide concrete cases and not abstract propositions of laws." *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981). The argument of Amici is fatally flawed because the issues addressed by Amici are not properly raised by the decision below.

Amici claim that the Sixth Circuit ruled that all "agreements" between a dual distributor manufacturer and its distributors are vertical. In fact, the Sixth Circuit never reached this issue. That court, after an analysis of the particular Chrysler distribution policies at issue, ruled merely that "[t]he record disclosed that the implemented marketing policies were "vertical" non-price restraints imposed by Chrysler upon its distributors' marketing policies . . ." (App. A at 3).[4] Accordingly, despite Amici's claims to the contrary, the

[3]Amici also err in arguing from the premise that the issue the Sixth Circuit was analyzing was the legality of a bid rigging or bid allocation agreement. As discussed *supra*, no bid rigging agreement could have arisen because ILG and Chrysler were not competitors in the sale of parts to which Chrysler's distribution policies apply.

[4]In reaching this specific conclusion regarding Chrysler's export restrictions, the Sixth Circuit relied on the same directive of this Court in *Business Elec. Corp. v. Sharp Elec. Co.*, 485 U.S. 717 (1988) "to analyze restraints in terms of economic realities and not verbal abstractions" (Br. at 6) which Amici concede is the proper standard of analysis.

Sixth Circuit's ruling has no broader effect than to subject Chrysler's non-price export distribution policies to a rule of reason inquiry.

Even if the court of appeals had made the broader holding, Amici cite to no opinion of this Court with which such a ruling would conflict. In addition, such a ruling would be in accord with the prevailing view that nonprice restraints imposed by a dual distributor manufacturer on its distributors are vertical and should be analyzed pursuant to the rule of reason. *See Illinois Corporate Travel v. American Airlines,* 889 F.2d 751, 753 (7th Cir. 1990); *Ryko Mfg. Co. v. Eden Services,* 823 F.2d 1215, 1230-31 (8th Cir. 1987), *cert. denied,* 484 U.S. 1026 (1988); *Dimidowich v. Bell & Howell,* 803 F.2d 1473, 1481 (9th Cir. 1986), *modified on other grounds,* 810 F.2d 1517 (9th Cir. 1987); *Davis-Watkins Co. v. Service Merchandise,* 686 F.2d 1190, 1201-02 (6th Cir. 1982), *cert. denied,* 466 U.S. 931 (1984); *Copy-Data Systems, Inc. v. Toshiba America, Inc.,* 663 F.2d 405, 409-11 (2d Cir. 1981); *Abadir & Co. v. First Mississippi Corp.,* 651 F.2d 422, 425-28 (5th Cir. 1981); *Donald B. Rice Tire Co. v. Michelin Tire Corp.,* 638 F.2d 15, 16 (4th Cir.), *cert. denied,* 454 U.S. 864 (1981).[5]

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[5]The case relied on by Amici to support their claim that in some circumstances agreements between dual distributors and their customers are horizontal, *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894, 899-900 (5th Cir.), *cert. denied,* 412 U.S. 923 (1973), involved an agreement which restricted a distributor who also competed with the supplier in the *manufacture* of certain products in the relevant market. It also preceded this Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977), in which this Court held that non-price restraints imposed by a manufacturer on its distributors are vertical and subject to a rule of reason analysis, rather than being *per se* illegal.

Amici also attempt to stretch the Sixth Circuit's rejection of ILG's coerced conspiracy claim into a ruling that all vertical restraints, including vertical price restraints, are *per se* legal. To the contrary, the Sixth Circuit, after analysis of Chrysler's specific non-price marketing policies, ruled only that Chrysler's unilaterally formulated and uniformly implemented export distribution policies did not violate Section 1 of the Sherman Act because "Chrysler needed no acquiescence from its . . . distributors in formulating marketing conditions for its [products]. . . ." Amici have identified no decision of this or any other court dealing with vertical non-price restraints which conflicts with the Sixth Circuit's ruling. Other courts of appeals are in agreement. *See Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1580 (11th Cir. 1988) (manufacturer's enforcement of distribution requirements not evidence of conspiracy in violation of Section 1); *Culberson, Inc. v. Interstate Elec. Co.*, 821 F.2d 1092, 1094 (5th Cir. 1987) (manufacturer's enforcement of "no subdistribution" policy not evidence of a Section 1 conspiracy). Accordingly, Amici's claim of the "astonishing" breadth of the Sixth Circuit's decision is without merit, and does not warrant review of the decision by this Court.

Finally, Amici argue, as did ILG in its petition, that ILG was not required to prove that "the government is a market". (Br. at 9). While Amici seek to rely on this Court's decisions in *FTC v. Superior Court Trial Lawyers Association*, 110 S.Ct. 786 (1990) and *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986), as support for this position, both cases, as well as the appellate decisions cited by Amici, relied on the discussion of a

particular market context.[6] This Court has long recognized the need for proof of a relevant antitrust market in order for a Sherman Act Section 1 plaintiff to state a claim. *See, e.g., International Boxing Club v. United States*, 358 U.S. 242 (1958). Accordingly, the Sixth Circuit's requirement that ILG prove a relevant market is not in conflict with any decision of this Court or of any court of appeals and therefore no further review of the decision is needed.

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[6]In *Superior Court Trial Lawyers*, the recognized market was the market for provision of legal services to indigent criminal defendants in the District of Columbia Superior Court; in *Federation of Dentists*, the provision of dental services in Anderson and Lafayette, Indiana; in *Wilk v. American Medical Association*, 1990-1 Trade Cas. (CCH) ¶ 68,917 (relied on by Amici), the provision of healthcare services nationwide, particularly care for the treatment of musculoskeletal problems; and in *Oltz v. St. Peter's Comm. Hospital*, 861 F.2d 1440 (9th Cir. 1988) (also relied on by Amici), the provision of anesthesia services in the Helena, Montana area.

CONCLUSION

Amici have raised no issues of importance suggesting the need for review by this Court. ILG's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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